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The legal framework applicable to combatting terrorism – National Report: Denmark

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1. Overview of situation with regard to terrorism

Two packages of anti-terror legislation in Denmark

In Denmark, the 9/11 events immediately triggered a series of legislative initiatives that were clustered into a single anti-terror package enacted in 2002. In the wake of the 2006 terrorist bombings in Madrid and London, a second anti-terror package was adopted. Consecutively, the two anti-terror packages expanded the ambit of substantive criminal law significantly.

The amendments of provisions in the substantive part of the Penal Code (PC) represent far-reaching new forms of criminalisation with a rather indeterminate scope. The boundaries of criminal law have been pushed forward in order to encompass various modalities of participation, including activities that might represent a hypothetical risk of facilitating actual terrorist acts but may actually be only very remotely linked up with such activities. The *actus reus* as well as the *mens rea* requirements for incurring criminal liability are stipulated in quite vague terms, not only in the statutory provisions, but also in the preparatory work for the underlying bills. In general, the two anti-terror packages consist of precipitate measures based on preparatory work lacking sufficient legislative quality. The enacted criminal law provisions consist partly of verbatim transcripts of formulations found in EU law and other international sources, that are not suitable as paradigms for drafting statutes under a domestic legal order.

Terrorism provisions as anchorage point for other legislation

The provisions regarding terrorist acts and offences related to terrorism enshrined in the Penal Code (PC) do not just prescribe a ban on certain acts as punishable offences that a perpetrator may be convicted of in a criminal court. They also constitute a foundation on which all other legislation on combating and preventing terrorism rests, i.e. a common point of reference. Thus, the rules laid down in the Penal Code provide the basic setting for many other components of the accumulated anti-terror legislation, i.e. for regulations that determine the nature and scope of special powers held by various government bodies regarding cases involving "crimes against the state".¹

A whole series of statutes found elsewhere in legislation are linked to these provisions. Therefore, the provisions defining terrorist offences are integrated and constituent parts of the material criteria for demarcating the limits for other offences as well as the boundaries for exercise of various powers vested in the courts, law enforcement and intelligence agencies, and other government authorities. Consequently, the substantive criminal provi-

¹ Such offences are determined by the provisions in Chapters 12 and 13 of the Penal Code. The anti-terror provisions in Sections 114-114 h PC are placed in Chapter 13.

sions therefore greatly influence decision-making regarding, for example, instigating coercive and particular intrusive measures in criminal investigations and proceedings, disclosing or exchanging sensitive personal information and other kinds of data, refusing to grant citizenship, expelling foreigners from the country, placing aliens under detention or restricted conditions, etc. The concerns with respect to the potential undermining of legal rights due to the adoption of vague and wide-reaching provisions under substantive criminal law relate in particular to the contagious effect of the legislative initiatives on decision-making in *intelligence, investigative- and administrative-law* contexts, where there is considerable risk of due process and fundamental rights being jeopardized. The provisions are conducive, for example, to an exaggerated propensity to authorise disproportionate control measures – including, in particular, targeting political activists and people with a non-Danish ethnic background – who belong to groups that communicates via obscure messages or use militant rhetoric.

1.1 Definition of terrorist acts – Section 114 PC

The 2002 anti-terror package inserted a new and innovatory Section 114 into Chapter 13 of the Penal Code.² The provision did not in itself broaden the already existing scope of criminalisation. Evidently, terrorist acts could earlier have been punished under previously established provisions concerning various forms of serious crime, irrespective of a perpetrator's terrorist motive. Politically, however, there was a desire “to convey more clearly that terrorism in all its forms is unacceptable in a democratic society”.³ Under the new Section 114, the maximum penalty for all kinds of terrorist acts now became life imprisonment.

The amended Section 114 contains a definition of “terrorism”, i.e. terrorist acts. The definition is basically a verbatim transposition of the definition under FD 2002 Article 1. The statutory definition enumerates a number of offences (homicide, grave assault, deprivation of liberty, etc.) committed with the intent to seriously “intimidating a population”, compelling a Government or an international organisation, or destabilising or destroying the social order in certain specified ways. The statute is particularly open and far-reaching, among other things because the Penal Code in line with the Framework Decision on combating terrorism has adopted the term “destabilise or destroy [...] fundamental political, constitutional, economic or social *structures*” [italics added]. The concept of “structures” is not used in a similar manner anywhere else in Danish legislation. The same provision applies to anyone who transports weapons or explosives or threatens to commit homicide or assault with the terrorism intent described above.

² A provision with the same numbering previously contained a so-called “corps ban” against supporting or participating in certain militant groups; the provisions have now been moved to Section 114 f and Section 114 g.

³ The Government's explanatory memorandum to the bill.

The *mens rea* element required under Section 114 may be any form or degree of intent. In principle, therefore, even *dolus eventualis* (*Eventualvorsatz, bedingter Vorsatz*) could imply criminal liability.

The technical completion of the offence stipulated under Section 114 has been moved forward in the sense that it depends on the perpetrator's preparatory acts and the relevant intent, not on the commission of a fully-fledged terrorist act. A terrorist act can also consist of threatening to commit one of the offences specifically listed under Section 114.

During the political discussions of 6–7 December 2001 about the Commission's proposal for a Framework Decision on Combating Terrorism, a Council Statement⁴ was issued in order to express agreement that the proposed instrument would cover acts "committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded". Further, it was stated that the Framework Decision "cannot be construed so as to argue that the conduct of those who has acted in the interest of preserving or restoring these democratic values... could now be considered as "terrorist acts".

According to the quoted Council Statement, the Framework Decision can also not be construed so as to incriminate on terrorist grounds "persons exercising their fundamental rights to manifest their opinions, even if in the course of the exercise of such rights they commit offences". In principle, this implies that demonstrators and activists cannot normally be charged under sections related to terrorism. The legal boundaries are, however, still fluid.

The Council Statement regarding the interpretation of the Framework Decision is quoted in the memorandum issued by the Danish Parliament's Judiciary Committee to accompany the bill concerning the 2002 anti-terrorism package. The Committee noted that the Council Statement should be taken into consideration in the interpretation of the new statute to rule out criminal liability in atypical cases not reasonably meant to be covered.

The phrasing chosen in Section 114 is essentially the same as that of the Framework Decision. Wording of this sort is not necessarily suitable when it comes to defining offences under national criminal law, where a higher degree of precision should ideally be sought in accordance with a *lex certa* principle. Indeed, other Member States have opted to implement the framework decision in completely different ways than Denmark.

The new provision under Section 114 operates with a *general maximum penalty of life imprisonment*. Qualifying all underlying offences in question by enhancing the maximum penalty indiscriminately to life imprisonment implies that there is *no statute of limitations* for any of the offences listed.

⁴ Council Statement 109/02.

*Glostrup case:*⁵ T was found guilty of attempted terrorism [attempted homicide]. T and two young co-defendants were charged with planning a trip to Bosnia in order to procure weapons and explosives for use in a terrorist act at an unspecified location. The co-defendants M1 and M2 subsequently acquired approx. 19.8 kg of explosives, a suicide belt, a suicide video, a detonator and a pistol with a silencer and ammunition. The attempted offences were prevented by the arrest of M1 and M2 by the local police in Bosnia. Both were subsequently convicted by Bosnian courts of planning a terrorist act and sentenced to prison for eight and six years, respectively.

Initially, T was supposed to travel with the other two to Bosnia, but he was prevented from doing so by his father who had learned of the plans and confiscated his passport. Observing that, on the one hand, T had been found guilty of attempting the most serious form of terrorism, and that, on the other hand, he had merely just turned 16 at the time of the offence, the Supreme Court sentenced him to seven years imprisonment.

Three co-defendants were found guilty by the jury but the verdicts were overruled by the High Court judges. The Director of Prosecution [Da: *Rigsadvokaten*] subsequently dropped the charges against two of the three and pursued a new indictment against the third. At the retrial, this defendant was acquitted by the jury despite the presiding judge favouring a guilty verdict in his summing-up previous to the jury's deliberations.

The case gave rise to discussion about the quality of evidence and the admittance of witness evidence regarding the defendants' religious beliefs and possible radicalisation, including testimony by one of the defendants' former teachers.

*Vollsmose case:*⁶ Three defendants were convicted of attempted terrorism [attempted homicide and bomb detonation] for jointly, by acquiring fertilizer chemicals and laboratory equipment, and by producing home-brewed explosives, having made preparations for the manufacture of one or more bombs for use in a terrorist act at an unspecified location. The Supreme Court stated that the ordinary sentence for attempted terrorism by bomb detonation and homicide is 12 years imprisonment.⁷ A fourth defendant was entirely acquitted by the jury. The case raised questions about the Danish Security and Intelligence Service's [Da: *Politiets Efterretningstjeneste, PET*] use of informants and undercover agents, the partial lack of disclosure of case documents to the defence, the introduction of character witnesses, and the court's exclusion of defence witnesses.

*Glasvej case:*⁸ Two defendants aged 22 were found guilty of attempted terrorism by acquiring bomb manuals and chemicals, and by producing and detonating TATP, an unstable explosive which they had tested on the staircase in the building where they lived and in other places. There had been contacts with al-Qaeda, and that the main perpetrator had attended training camps in Waziristan. The main perpetrator was sentenced to 12 years imprisonment, the co-defendant to eight years.

*Axe attack on 'Mohammad' cartoonist:*⁹ A 28-year-old Somalian man was convicted, *inter alia*, of attempted terrorism by endeavouring to assassinate the newspaper cartoonist Kurt Westergaard. The defendant was sentenced to ten years imprisonment. The perpetrator broke into the cartoonist's house in the evening of 1 January 2010 by smashing a window with an axe. His intention to kill the cartoonist was thwarted because the latter had taken refuge in his bathroom, which the police had previously secured as a panic safe-

⁵ U 2008.127 H.

⁶ U 2008.1587 H.

⁷ Twelve years imprisonment is also the ordinary punishment for completed homicide. The normal penalty for attempted homicide is six years' imprisonment.

⁸ TFK 2009.762 Ø.

⁹ Western High Court ruling, 21 June 2011.

room, and because the police arrived minutes after Westergaard had pushed the emergency button.

In the High Court, the judges and three jurors voted to uphold the ruling of the municipal court, while the other three jurors voted to acquit the defendant of the count regarding attempted terrorism.

*Lors Doukaev case:*¹⁰ A 25-year-old Chechen residing in Belgium was convicted, *inter alia*, of attempted terrorism by being in possession of a bomb containing TATP, which he intended to send to the offices of the newspaper *Jyllands-Posten* that initially published the Mohammad cartoons. The perpetrator entered Denmark under a false name, registered at the Hotel Jørgensen in downtown Copenhagen using a second fake identity, and ordered a bus ticket to Liège under yet another false name. He brought with him to Denmark the bomb device and a gun. Visiting various shops he wore varying disguises. The bomb exploded in his hands in a bathroom at the hotel where he was lodging, and after a dramatic chase he was arrested in a nearby public park.

As a result of an explosion when he was a child in Chechnya, the defendant wore a prosthetic leg. He had removed serial numbers from it, as well as from the gun, which might otherwise have identified him.

*Planned attack on newspaper building Jyllandsposten/Politikens Hus.*¹¹ Four individuals residing in Sweden departed for Copenhagen and were arrested and charged with conspiracy to attack and kill people in the newspaper building on the Copenhagen town square Jyllandsposten/Politikens Hus. They were all convicted and sentenced to 12 years imprisonment. One of the defendants appealed, but the High Court substantiated the municipal court's judgement.

*Activist arsonists case:*¹² Five militant activists have been charged with attempted terrorism. The charges include arson attacks and attempted attacks on the Police Educational Centre, the Police Intelligence and Security headquarters, the Parliament building, the Greek Embassy and several buildings belonging to private companies, e.g. in the fur trade. The defendants were only convicted on part of the indictment, and the jury didn't reach a majority on favor of conviction for terrorist acts under Section 114. The case is currently pending on appeal.

1.2 Experience of terrorism and level of threat

In a relatively large number of cases, defendants have been indicted and convicted under the new anti-terror packages. The cases that have been adjudicated reflect the impact on Islamic radicalisation deriving from the fact, that Denmark is a close ally to the U.S.A., that the Danish Government has been a very active participant in the military operations in Iraq and Afghanistan, that the political climate in Denmark is to some degree tainted by xenophobic and anti-Muslim sentiments, and that the publication of the cartoons of the Prophet Mohammad in the newspaper *Jyllands-Posten* has been widely noticed internationally and has caused anger and uproar in Muslim communities.

¹⁰ Copenhagen Municipal Court judgement, 30 May 2011.

¹¹ Glostrup Municipal Court judgement, 4 June 2012, and Eastern High Court judgement, 25 January 2013.

¹² Copenhagen Municipal Court judgement, 13 December 2012.

In an assessment report of 10 January 2013, the Centre for Terror Analysis, CTA, under the National Security and Intelligence Service, PET, it is stated that the terror threat against Denmark remains significant. It primarily emanates from groups, networks and individuals who adhere to a militant Islamist ideology. The threat is mainly directed towards targets with affiliation to the Cartoon Case. CTA assesses that in the future militant Islamists will also identify other targets, including targets of symbolic value or easily accessible and unprotected targets. In the summary of the report, the CTA further notices the following:¹³

“An increasing number of individuals from the West, including Denmark, seek out regions affected by violent conflict. Stays in such regions may lead to contact with militant Islamists and, thus, a risk of being radicalised. CTA assesses that there is an added risk of terror-related activities when such individuals return home.

CTA assesses that small groups and individuals associated with political left- or rightwing extremist circles in Denmark pose a certain terror threat. The terrorist attacks in Norway on 22 July 2011 and other events abroad may have an inspirational effect on individuals and groups in Denmark. In left-wing extremist circles there are individuals who have the will and capacity to commit serious, violent crimes, including arson and attacks on political opponents.

CTA assesses that a terrorist attack in Denmark could be executed using easily accessible weapons such as stabbing weapons, small arms, incendiary bombs or home made bombs. A terrorist attack can take place without prior intelligence-based indications.

CTA assesses that the continued militant Islamists focus on Denmark may make Danes and Danish interests the target of terrorist attack and kidnapping in certain parts of the world. The primary terror threat to Danes abroad emerges when they are in places that may be local terrorist targets.

The risk of falling victim to a terrorist attack in Denmark or abroad remains very limited, except in certain foreign conflict zones.”

A number of specific issues are covered in reports posted on CTA’s website.

1.3 Overview of counter terrorism legislation

Inspiration for the amended Penal Code provisions concerning miscellaneous types of conduct more or less closely related to actual terrorist acts was primarily derived from the templates used in the design of various UN legal instruments.

The series of sections on counter terrorism now encompassed by the Penal code includes Sections 114 (terrorist acts), Section 114 a (terrorism-like offences), Section 114 b (financing and support, ect.), Section 114 c (recruiting), Section 114 d (training), Section 114 e (facilitation), and Section 136 (incitement). For details, see below.

¹³ See <https://www.pet.dk/~media/Engelsk/2013VTDENGENDpdf.ashx>.

1.4 Legal qualification of public provocation, recruitment and training

Public incitement to crime

The 2005 European Convention obliges signatories to criminalise *public provocation to commit a terrorist offence*. Under Danish law, this did not necessitate any criminalisation of new offences, as the Penal Code already contains a general provision on public incitement to “crime”, see Section 136(1) PC.¹⁴ Until the above mentioned 2007 judgement in the case against the Danish-Moroccan Said Mansour, this provision had not been used since 1938.

Public approval of a crime against the State, etc.

Indirectly, the two anti-terror packages criminalised expressions of sympathy in relation to terrorism activity to a wider extent than was previously the case. An old provision regarding public approval of a crime against the State is contained in Section 136 (2) PC. Technically, this statute is completed by a general reference to all offences under Chapters 12 and 13 of the Penal Code. As the statutes on terrorism offences are placed in Chapter 13, the anti-terror packages have endowed Section 136(2) with a broader range of application.

Active recruitment or training for terrorism, etc.

Under the 2005 European Convention on the Prevention of Terrorism, recruitment and training for terrorism must be criminalised. The 2006 anti-terror package contained two long-winded sections about this, cf. the amended statutes under Section 114 c and Section 114 d. Both of these provisions relate not only to actions covered by the actual provision on terrorist acts in Section 114 but also to the additional provision on terror-like activities under the new Section 114 a.¹⁵ Both Section 114 c and Section 114 d include activities that might lead someone to either *commit* or *facilitate* an as yet unspecified terrorist act or terror-like activity.

The first sentence of the first subsections of each of the two provisions reads as follows:

“Section 114 c (1). Imprisonment of up to 10 years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Section 114 or 114 a or to join a group or association in order to facilitate that the group or association commits acts of this nature.”

“Section 114 d (1). Imprisonment of up to 10 years shall be imposed on

¹⁴ The maximum punishment under Section 136 (2) is imprisonment for up to 2 years.

¹⁵ Both Section 114 c and Section 114 d authorise enhanced sentencing maxima: “Under particularly aggravating circumstances, the maximum sentence may be increased to imprisonment for up to 16 years. Particularly aggravating circumstances are considered to involve offences of a systematic or organised nature.”

anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Section 114 and 114 a, knowing that this person has an intention to use the skills to pursue such an aim.”

The *mens rea* requirement under both of the cited provisions is intent. However, it is uncertain what the requirement is with respect to the *concretization* of such an intent in relation to the activities towards which the recruitment/training is aimed.

Ostensibly, the offences criminalised under Section 114 d (1) might include training in skills that it, under certain circumstances, could be perfectly legal to acquire and practise, but which can also be used in connection with a terrorist or terrorist-like action. However, the *mens rea* requirement is twofold intensified. Liability for a “teacher” requires that the “pupil” *intends* to use the acquired skills for the stipulated purpose, and that the former has *knowledge* of this, i.e. acts with direct intent.

Active recruitment or training for financing of terrorism, etc.

The second subsections of Section 114 c and Section 114 d ban recruitment and training to *commit* or *facilitate* acts covered by Section 114 b, which, as mentioned above, prohibits various forms of financial support for terrorists or terrorist organisations.¹⁶ The wording is as follows:

“**Section 114 c (2).** Imprisonment of up to 6 years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Section 114 b or to join a group or association in order to facilitate the group or association to commit acts of this nature.”

“**Section 114 d (2).** Imprisonment of up to 6 years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Section 114 b, knowing that this person has an intention to use the skills to pursue such an aim.”

Passive recruitment or training for terrorism, etc.

The new provisions in the second anti-terror package also made it a criminal offence to “let yourself” be recruited or trained “to commit or facilitate” terrorist acts or terror-like acts, cf. Section 114 c (3) and Section 114 d (3) respectively. Violations are punished by imprisonment of up to 6 years.

The European Convention does not in any way oblige the signatory states to establish such criminalisation. In the preparatory comments by the Danish Government to the bill, this spectacular legislative innovation was merely explained by a bland remark that, as a counterpart to the criminalisation of active recruitment and training for terrorism, it would allegedly be “natural” to also criminalise letting yourself be recruited or trained “to commit terrorist acts”, and that this would be in line with the general trend

¹⁶ In 114 b there is, as mentioned, a reference to the terrorist acts and terror-like acts covered by Section 114 and Section 114 a.

to advance the boundaries for the use of criminal law to protect society against terrorism.

Recently Section 114 d (3) has received a great deal of public attention, not least due to report regarding Danish citizens and residents allegedly travelling to training camps run by terrorist groups in Somalia and the Middle East. The first appearance of Section 114 d (3) in a court judgement came in March 2013.

*The Somalian brothers from Aarhus:*¹⁷ Two young brothers of Somalian origin were convicted of letting the older brother be trained, instructed or in other ways taught to commit acts of terror. According to the judgement, the older brother had received training in a al-Shabaab camp in Somalia. His younger brother, who stayed in Aarhus, was convicted of criminal participation by transferring money and by aiding and abetting. Both defendants were sentenced to imprisonment for 3 years and 6 months. They both appealed the judgement on a plea of acquittal. The appellate case is pending.

2. National legal framework on combating terrorism

2.1 Provisions on aiding or abetting, inciting and attempting an offence

General provisions on criminal participation and attempt

Danish law is unusually far-reaching in terms of stipulating the scope of criminal participation and attempt. The statutes to this effect are general in nature and, in principle, apply to any particular substantive offence, whether covered by the Penal Code or other legislation. The obligations under Article 4 are met by virtue of the general provisions in Section 21 PC and Section 23 PC as cited below. These provisions also apply to the specific provisions criminalising preparatory terrorism offences like financing, facilitation, recruitment, training and incitement, implying that the scope of criminal law in this area has become extremely wide.

It is a punishable offence under Danish law in some way to aid, abet, incite, etc. a specific criminal enterprise, e.g. a specific terrorist act or some other type of terrorism offence. The defendant will in that case become liable either as a co-perpetrator or as an accomplice to the act in question, possibly with reference to the general and extremely broad provision on criminal participation in Section 23 PC, see author's translation below. Such liability requires that the defendant has acted with some degree of concretised intent that the main offence be completed, e.g. with regard to location, time and method.

¹⁷ Aarhus Municipal Court, 25 March 2013.

“Section 23(1)(1) PC: The statute criminalizing a particular offence applies to anyone who by inciting, counselling or aiding participated in the act.”

It is a punishable preparatory offence under Danish law in some way to commit an act aiming at the promotion or accomplishment of a criminal offence, e.g. a concrete terrorist act or some other type of terrorism offence. The defendant will in that case be convicted of criminal attempt with reference to the general and extremely broad provision in Section 21 PC, see author's translation below.

“Section 21(1) PC: Acts which aim at the promotion or accomplishment of a criminal offence shall be punished, when the offence is not completed, as criminal attempt.”

In the jurisprudence concerning terrorist acts under Section 114 PC, convictions in all cases have been for criminal attempt, not completed terror.

Financing of and support for terrorism, etc.

The 2002 anti-terror legislation made it a criminal offence to support a terrorist or a terrorist organisation as such, or to facilitate such a person's or entity's activities, even in instances where the general, and rather wide-reaching, rules regarding co-perpetration by aiding and abetting a specific terrorist act or terror-like act do not apply.

Providing economic or financial support to a terrorist, a terrorist group, or a terrorist organisation, may constitute a violation of the exceedingly vague provision on financing, etc., in Section 114 b PC:¹⁸

“Section 114 b. Imprisonment of up to 10 years shall be imposed on anyone who

- 1) directly or indirectly *provides financial support* for,
- 2) directly or indirectly *procures or collects funds* for, or
- 3) directly or indirectly *makes money, other assets or financial or other similar services* available to

a person, group or association that commits or intends to commit acts covered by Section 114 or Section 114 a.”¹⁹

This provision also targets the funding of organisations whose activities include both humanitarian and terrorist activities.

¹⁸ Originally Section 114 a PC.

¹⁹ Author's italics. Regarding the current Section 114 a, see below about terror-like acts introduced in 2006 under the second anti-terror package.

*Fighters+Lovers case:*²⁰ Six activists were indicted for attempt to procure funding for terrorist organisations. They had been involved, via the company *Fighters+Lovers*, in selling T-shirts worth approx. DKK 25,000 in order to transfer a portion of the profit to the organisations FARC²¹ and the PFLP.²² Allegedly, the money was earmarked for purchasing radio equipment for FARC and a printing press for the PFLP. All defendants were acquitted by the municipal court which did not on the merits of the case find sufficient grounds to consider FARC and PFLP as terrorist organisations. On appeal, the High Court found them guilty.

The High Court held that FARC has been responsible for launching indiscriminate mortar attacks in which civilians were victims, and that FARC has killed civilians, subjected civilians to serious violence and carried out kidnappings, including of politicians and a presidential candidate, in order to undermine the political process in Columbia.

As far as the PFLP is concerned, the Court found that the organisation had, in a number of incidents, attacked and killed civilians, e.g. by using car bombs and suicide bombers, and that PFLP's militant wing, the Abu Ali Mustafa Brigades, had carried out attacks, including suicide attacks, in which civilians had been killed and wounded.

The fact that the funds were allegedly raised for humanitarian purposes was insignificant to the High Court's ruling on the question of guilt or innocence. However, one of the judges stated that FARC must be considered a rebel movement and the PFLP a resistance movement and that such organisations therefore cannot be assigned the required terrorism intent. Thus, this member of the Court voted to acquit all of the defendants entirely.

One of the defendants had been indicted solely for the reason that he had placed a poster on his hot-dog cart displaying the T-shirts and a web address. The Court found his participation too insufficient for a conviction.

The Supreme Court upheld the High Court ruling. Two defendants were sentenced to 6 months imprisonment, two defendants were sentenced to 4 months imprisonment, and two defendants were sentenced to 2 months imprisonment, but all sentences were suspended due to an acknowledgement of the fact that the reach of Section 114 b PC had been questionable previous to the trial.

*'Rebellion' case:*²³ The association 'Rebellion' [Da: *Foreningen Oprør*] published documents on its website, calling for European solidarity movements to participate in continuing resistance to anti-terror legislation, terror lists, and the international 'war on terror'. The documents stated that substantial amounts had been transferred to the PFLP and FARC. The documents were seized, and a spokesperson for the association was convicted and sentenced to six months suspended imprisonment.

*Horserød-Stutthof Foreningen & Den Faglige Klub:*²⁴ A 72 year old chairman for an association of former concentration camp prisoners was convicted and sentenced to six months imprisonment, of which four months were suspended. Subsequently to the *Fighters+Lovers* judgement, the association has collected DKK 17,700 for PFLP. Further, the chairman for a labour union movement was convicted and sentenced to six months suspended imprisonment for collecting DKK 10,000 for FARC.

*Al-Aqsa case:*²⁵ In 2005, charges were brought under Section 114 b (originally Section 114 a) against the chairperson and treasurer of the al-Aqsa Association in Denmark. The

²⁰ U 2009.1453 H.

²¹ *Fuerzas Armadas Revolucionarias de Colombia*.

²² *Popular Front for the Liberation of Palestine*.

²³ U 2007.1831 HK and Copenhagen Municipal Court judgement, 16 March 2010.

²⁴ Copenhagen Municipal Court judgement, 16 June 2011.

²⁵ Eastern High Court appellate judgement, 6 February 2008.

investigation was initiated in 2002, when information was received that members of the association had collected and transferred funds to organisations and individuals in the Middle East with links to Hamas, which is on the EU terror list. The prosecution service failed to provide sufficient evidence that the involved organisations were part of Hamas. The High Court therefore upheld a municipal court acquittal by a vote of 3–3.

The *mens rea* requirement under Section 114 b is intent, and even the lowest degree of intent is sufficient, e.g. an assumption that the recipient or client would have some kind of connection to terrorism.

Promoting terrorism

An “extended complicity rule” has been added to the Penal Code, which now prohibits any form of assistance, etc., to an individual, a group or an association that commits or has the intention to commit terrorism or act related to terrorism, cf. Section 114 e.²⁶ This statute even covers activity which cannot be attributed to specific terrorist acts

“114 e. Imprisonment of up to 6 years shall be imposed on anyone who otherwise advances the activities of an individual, a group or an association, committing or intending to commit actions included in Section 114, 114 a, 114 b, 114 c, or 114 d.”

According to the preparatory works of the anti-terror packages, the aim of this provision is, *inter alia*, to target anyone who provides professional and general advice that is not directly related to a specific terrorist act, e.g. in the form of a lawyer or accountant offering assistance to an organisation that the provider knows commits terrorist acts. This may imply the attribution of criminal liability to “a person who, in relation to a specific act of terror may only be complicit at third or fourth hand”.²⁷ However, at the core of the statute there is naturally a portion of reason, and courts have not applied the provision excessively.

*Said Mansour case:*²⁸ The very first indictment under the new anti-terror provisions was raised against a Danish citizen of Moroccan origin. This radical Islamist was found guilty of public incitement to crime and hate speech. The defendant had produced and distributed materials that explicitly call for militant jihad, including by virtue of known terrorists being depicted in the material and of suicide bombings and the killing of innocent hostages being celebrated. He was sentenced to three years and six months imprisonment.

Al-Aqsa case: In the aforementioned case concerning two members of the al-Aqsa association in Denmark and the association *per se*, the charges were in principle brought under Section 114 b, or subordinately under 114 e. As previously mentioned, the case referred to the collection and transfer of funds to certain organisations in the Middle East.

²⁶ Originally 114 b.

²⁷ The Government’s explanatory memorandum to the bill.

²⁸ Copenhagen City Court judgement, 11 March 2007.

*TRO Denmark case:*²⁹ In the television news programme *Sunday Magazine* broadcast by *Danmarks Radio*, the organisation *Tamils Rehabilitation Organisation* was accused of having sent money collected for tsunami victims to the Tamil Tigers, an organisation that appears on the EU terror list. The Canadian intelligence service had labelled TRO Canada as a front for the Tamil Tigers. Accounts belonging to the organisation were seized by the Danish authorities. In the course of the investigations, TRO Denmark was added to the USA's terror list, but the Court was not sufficiently furnished with in-depth information as to why the organisation had been included in that list. However, the Court found that the conditions for seizure ("freezing") with a view to confiscation had been met by reference to inclusion on the American list.

*ROJ TV A/S & Mesopotamia Broadcast A/S METV:*³⁰ The charge concerns repeat broadcasting of propaganda in favour of the Kurdish organisation PKK/Kongra Gel, which has been blacklisted by the EU. The broadcasts include interviews with PKK-leaders and sympathizers, coverage of battles between Kurds and Turkish authorities, and reports from PKK-training camps. The prosecutor maintained that the broadcasting-system had acted as a mouthpiece for PKK by glorification of PKK and terrorism actions committed by the organisation. The indictment was addressed to the corporation as a legal person. The municipal court ruled that PKK is a terrorist organisation and that the broadcast company's biased coverage could be characterised as propaganda for PKK. Each of the two companies were convicted under Section 114 e and sentenced to 45 dayfines à 65.000 DKK. The case is currently under appellate review.

Terror-like offences

The 2006 anti-terrorism package further extended the scope of criminalisation in a very peculiar and rather diffuse way, including via the insertion of a new Section 114 a into the Penal Code. Reference was made to a wish to accede to the 2005 convention on the Prevention of Terrorism established by the Council of Europe. Basically, the Convention obligates states to criminalise incitement/recruiting/training in terrorism. However, at the time when the instrument was being prepared, agreement could not be reached on a general definition of terrorism. The Convention therefore only contains an empty framework provision for so-called *terrorist offences*. This concept is then completed by reference to a number of older conventions, listed in an appendix to the new convention. These conventions deal with terrorist acts as well as other types of offences, without necessarily identifying a particular purpose, motive or intent with respect to intimidating a population, threatening a government, etc. The conventions cover security for diplomats, airlines, maritime vessels, nuclear-power plants and platforms on the continental shelf. They also cover hostage-taking, terrorist bombings and the funding of terrorism. Admittedly, these conventions were adopted with an overall aim of combating terrorism in various guises, but they also include a diverse range of other types of acts. The conventions reflect the fact that the UN has not been able to establish a consensus on a uniform definition of terrorism, which is why a "salami-slicer method" has been employed

²⁹ Eastern High Court ruling, 8 April 2008.

³⁰ Copenhagen Municipal Court, 10 January 2012.

instead. When, occasionally, the opportunity presented itself by the occurrence of yet another type of serious attack on common goods recognised as such by the international society, an additional convention was introduced, focusing on specific types of actions, of which some, but not all, have a terrorist aim.

The new Section 114 a lists the above-mentioned conventions. It does not as such establish new *sui generis* crimes, but basically authorises enhanced sentences for offences that are covered by such treaties but which do not constitute terrorist acts in the stricter sense of Section 114.

“114 a. If one of the acts mentioned under para. 1-6 below is committed without the act being covered by Section 114, the punishment may exceed the statutory maximum penalty for the offence by up to half [...].”³¹

The cited opening of the statute is followed by a long-winded and complicated catalogue, in six separate paragraphs, of offences that trigger the prescribed enhancement of the ordinarily authorised sentencing maximum. Each paragraph consists of a long list of selected provisions from the substantive part of the Penal Code, accompanied by a requirement that the particular offence is also covered by one of the specified treaty provisions. For considerations of space, only the simplest paragraph, which is found in 114 a (3) will be cited here:

“3) Violation of Section 261 (1) or (2) when the act is covered by Article (1) of the International Convention against the Taking of Hostages dated 17 December 1979.”

Each of the five other paragraphs lists a dozen separate statutes from the Penal Code. No other provision in the Code has ever been phrased in a style even remotely resembling this chaotic and illegible manner.

In itself, Section 114 a solely concerns stricter sentencing latitudes. However, since all the other statutes regarding the prevention of terrorism refer directly to Section 114 a, this provision actually creates several new criminal offences. The odd statute constitutes a link to other provisions, including the section on support and funding,³² the special and very wide-ranging complicity rule,³³ the new sections on recruitment and training for terrorism or terrorist-like acts,³⁴ as well as the provision about public incitement or approval of the offences covered by part 12 or part 13 of the Penal Code.³⁵

³¹ The second part of the first paragraph under Section 114 a provides that the punishment under certain conditions can be enhanced to imprisonment for up to six years, although the ordinary maximum sentence for the offence concerned is less than four years imprisonment.

³² Section 114 b PC.

³³ Section 114 e PC.

³⁴ Section 114 c and Section 114 d, respectively.

³⁵ Section 136 (2) PC.

When in 2008, the Framework Decision on combatting terrorism was amended to include provisions equivalent to those of the European Convention, no additional legislative initiative was needed under Danish law.

2.2 Definition and liability of legal persons

As a kind of secondary effect, the 2002 anti-terror package considerably expanded the area in which penalties may be imposed on legal persons (“corporate liability”) under Section 306 of the Penal Code. A legal person can now become criminally liable for any violation of a Penal Code statute.

“**Section 306.** Criminal liability can be attributed to companies, etc. (legal persons) under the rules contained in Chapter 5 for violation of this Act.”

In this connection, too, the stated reason for the amendment was a reference to the requirements contained in the UN Convention on the prevention of Terrorism. However, the scope of the Penal Code’s provision on corporate liability is completely general in reach, as it doesn’t merely include terror-related activities, but any violation of a Penal Code statute.

2.3. Types and levels of criminal penalties

Section 114:

Under Section 114, the maximum penalty for all kinds of **terrorist acts** is **life imprisonment**. As previously mentioned, the Supreme Court has stated that the ordinary sentence for attempted terrorism by bomb detonation and homicide is 12 years imprisonment (Vollsmose-case, cited above).

Section 114 b:

“**Section 114 b. Imprisonment of up to 10 years** shall be imposed on anyone who

- 1) directly or indirectly *provides financial support* for,
- 2) directly or indirectly *procures or collects funds* for, or
- 3) directly or indirectly *makes money, other assets or financial or other similar services* available to

a person, group or association that commits or intends to commit acts covered by Section 114 or Section 114 a.”³⁶

In the previously cited *Fighters+Lovers* case, two defendants were sentenced to 6 months imprisonment, two defendants were sentenced to 4

³⁶ Author's italics. Regarding the current Section 114 a, see below about terror-like acts introduced in 2006 under the second anti-terror package.

months imprisonment, and two defendants were sentenced to 2 months imprisonment, but the Supreme Court suspended all sentences due to an acknowledgement of the fact that the reach of Section 114 b PC had been questionable previous to the trial.

In the previously cited '*Rebellion*' case, a spokesperson for the association was convicted and sentenced to six months suspended imprisonment.

In the above mentioned case regarding *Horserød-Stutthof Foreningen & Den Faglige Klub*, the 72 year old chairman for the association of former concentration camp prisoners was and sentenced to six months imprisonment, of which four months were suspended. Further, the chairman for a labour union movement was convicted and sentenced to six months suspended imprisonment.

Section 114 c and d:

"Section 114 c. Imprisonment of up to 10 years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Section 114 or 114 a or to join a group or association in order to facilitate that the group or association commits acts of this nature.

Imprisonment of up to 6 years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Section 114 b or to join a group or association in order to facilitate the group or association to commit acts of this nature."

"Section 114 d. Imprisonment of up to 10 years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Section 114 and 114 a, knowing that this person has an intention to use the skills to pursue such an aim.

Imprisonment of up to 6 years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Section 114 b, knowing that this person has an intention to use the skills to pursue such an aim."

To "let yourself" be recruited or trained "to commit or facilitate" terrorist acts or terror-like acts shall be punished by **imprisonment of up to 6 years**, cf. Section 114 c (3) and Section 114 d (3) respectively.

In the previously cited case regarding the *Somalian brothers from Aarhus*, two defendants were sentenced to imprisonment for 3 years and 6 months.

"114 e. Imprisonment of up to 6 years shall be imposed on anyone who otherwise advances the activities of an individual, a group or an association, committing or intending to commit actions included in Section 114, 114 a, 114 b, 114 c, or 114 d."

In the previously cited *Said Mansour case*, the defendant was sentenced to three years and six months imprisonment.

2.4 Aggravating circumstances in the determination of penalties

As previously demonstrated, sentencing latitudes are rather wide, and the provisions on terrorism offences do not specify aggravating circumstances in particular.

2.5 Provisions governing the initiation of investigation or prosecution

Investigation of terrorist acts and other terrorism offences

Regarding the traditional rules on initiation of investigating, surveillance, interception of communications, search and seizure, discovery of documents, preventive measures, etc., see the 2007 country profile on Denmark on the site of CODEXTER.

Regarding special provisions enacted by the two anti-terror packages, see subsection in the country fiche.

The prosecutorial authority of the Minister of Justice

Traditionally, Chapter 13 of the Penal Code covers 'crimes against the constitution and the supreme Government authorities, etc.', i.e. attacks on the State's internal security. The new provisions introduced by the two anti-terror packages form part of Chapter 13. The 2006 anti-terror legislation added 'terrorism' to the title of the chapter. As a matter of principle, offences referred to in Chapter 13 of the Penal Code are prosecuted only on the orders of the Minister of Justice, cf. 118 a PC. This scheme rely on the fact that in some instances such offences are tainted by political components and are rather vaguely described and of uncertain reach. Actually, the mentioned scheme does not imply that the Minister personally assesses whether an indictment should be invoked. In practice, a recommendation to this effect is prepared and submitted by the Director of Prosecution [Da: *Rigsadvokaten*], and the Minister will normally adhere to the prosecutor's advice. All things being equal, however, the fluid state of the law in this area implies a significant risk of politicization, arbitrariness and abuse of power in relation to intelligence gathering, investigation and the way in which the prosecution service exercises discretion.

2.6 Territorial reach and jurisdiction

Not only attacks on Danish national interests are covered by Sections 114-114 e PC. The overall object of protection can be “a country or an international organisation”, and the territorial reach of the anti-terror provisions is not subject to limitations. The provisions also include acts that do not require that force is deployed in order to exert influence on Danish affairs or to undermine the Danish social order, but are directed against the fundamental interests of other countries or international organisations. As far as sections 114 b-e PC are concerned, this is made explicit by a reference to Section 114 and Section 114 a. Thus, these provisions also serve to protect public affairs and social orders elsewhere, including from acts committed exclusively abroad. This is a consequence of a desire to better address terrorism’s global reach, as required under Security Council Resolution 1373.

And as demonstrated by the judgements in the above mentioned cases regarding support of FARC and PFLP, even oppressive regimes are protected in instances where the resistance victimises civilians.

Regarding jurisdictional issues, see subsection in country fiche.

*Weapons for Bengal resistance movement:*³⁷ In 2010, the Ministry of Justice decided to extradite a Danish citizen to India, where the individual concerned is accused of criminal offences committed in 1995. He acknowledges having participated in dropping weapons meant for a Bengal resistance movement from an aircraft. In 2002, Indian authorities had submitted a request for extradition subsequent to a change in Danish law that had made it possible to extradite Danish citizens for prosecution also to states outside the Nordic countries.

The Ministry linked the conduct of the accused to the statute on terrorist acts, which in 2002 had been inserted into the Penal Code, i.e. Section 114 PC. Previously, equivalent rules had not existed. Precariously, the Ministry also cited Section 114 f PC with the aim of offering a subordinate response to the requirement regarding double criminality.

The Hillerød Municipal Court overruled the administrative decision on extradition on the grounds that diplomatic assurances offered by the Indian Government could not be taken face value. This ruling was sustained by the High Court. Subsequently, diplomatic tensions have prevailed in the relations between India and Denmark.

3. Compliance with the Framework Decision

The FD 2002 as well as the FD 2008 have been implemented into Danish law in a fairly comprehensive manner, characterised by rather far-reaching substantive criminal law provision. The packages of anti-terror legislation introduced in 2002 and 2006 include a range of rather uncertain and wide-reaching provisions that fundamentally challenge the principle of legality.

³⁷ Eastern High Court appellate ruling, 30 June 2011.

4. Conclusions regarding effects and impact of the Framework Decision

Netwidening

The basic provision in Section 114 PC covers terrorist acts per se. This provision is construed to implement the basic requirements of the 2002 Framework Decision on Combating Terrorism. The Framework Decision's terminology is applied directly in the sense that the definition of a terrorist act has been transcribed literally into domestic law without further amelioration. Such a legislative technique causes substantial problems with regard to interpretation of the law by the national judiciary.

A vast number of supplementary statutes are characterised by a substantial widening of the scope of criminal law. These provisions are inchoate in the sense that they criminalise various activities that are more or less remote from actual or attempted terrorist acts, as well as participation in such activities. They not only cover funding and other means of supporting terrorism, but any conceivable kind of facilitation, incitement, training or recruitment. This modality of criminal law has rightly been labelled "pre-active". To a significant extent, the legislature has even over-implemented various legal instruments that are binding on Denmark by virtue of European Union law or other international obligations.

The anti-terror statutes have been drafted in a somewhat loose manner, without sufficiently thorough legislative preparations. They constitute a common point of reference for all of the other anti-terrorism legislation. The challenges regarding rule of law and due process therefore also relate to secondary legislation in fields such as law enforcement, intelligence gathering, public law, the treatment of foreigners, preliminary actions under criminal procedure, e.g. wiretapping, bugging, *data-sniffing*, room searching, etc.

Evidence problems

The cases that have given rise to criminal charges and subsequent prosecutions for violation of the terrorism provisions have been characterised by the severe difficulties involved in providing adequate evidence. However, none of the cases have concerned terrorist acts that have actually been completed. The charges have either focused on the preparation of terrorist acts, or on support or facilitation of terrorism activities. Some cases on attempted terrorism have mainly been based on information stemming from the surveillance of groups of people over considerable time periods. If such intelligence or police information indicates a significant risk of an imminent terrorist act, it will trigger immediate pre-emptive intervention. At this point, there is not necessarily sufficiently evidence to form the solid basis for an indictment, let alone a conviction. However, the risk that a terrorist act will

be committed may be considered serious enough that it would be irresponsible to take chances, even if a reticent and hesitant approach with continued surveillance could provide greater clarity about the degree of weight behind the suspicions.

The prosecutor's material has generally been quite complex and difficult to decipher, as much of the information is characterised by a certain degree of ambiguity. The monitored individuals communicate – via telephone calls, internet chat, sms, etc. – in a particular jargon, which can either be construed as a form of sub cultural dialect or as a security-conscious code, possibly in languages other than Danish. This makes it difficult to determine exactly what the aim of the more or less suspicious behaviour and arrangements is, and whether a specific terror intent can be proven. This has, for example, given rise to evidence being presented on whether the accused's attitude to society is characterised by an ideological or religious "radicalisation". In cases of funding terrorism, it has been relevant to obtain information about conditions in distant countries, and this has posed particular difficulties in relation to obtaining reliable information from independent sources. So far, the acquittal rate has therefore been relatively high. In several cases, there has been considerable uncertainty as to the validity of both convictions and acquittals. This has attracted particular attention in cases where jurors and judges have reached different conclusions concerning the question of guilt or innocence.

Overall conclusion regarding added value of the Framework Decision

Neither the National Security and Intelligence Service, PET, nor other relevant agencies have called for a further widening of their present powers. This notion is confirmed by the following section of the Danish 2007 country profile at the CODEXTER site:

"In Denmark, the adoption of a first "anti-terror package" in 2002 and a second "anti-terror package" in 2006, along with a number of legislative amendments, has provided the necessary legislative basis for effective prevention, investigation and prosecution of terrorist activities."

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